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13 UNITED STATES DISTRICT COURT
14 DISTRICT OF NEVADA

15 -Oo-

16 UNITED STATES OF AMERICA,)
17) CASE NO. 2:13-cr-00018-JCM-GWF
18 Plaintiff,)
19) MOTION FOR ORDER TO DISCLOSE
20 v.) FINANCIAL AFFIDAVIT OF
21) DEFENDANT DAVID BALL
22 DAVID BALL,)
23)
24 Defendant.)

25
26 I. INTRODUCTION

27 Based in part on information obtained from Defendant David Ball's ex-wife, the United
28 States has reason to believe that Defendant Ball made material false statements on his financial
29 affidavit submitted to this Court in connection with the above-captioned matter. Therefore, the
30 United States respectfully moves for an order to disclose the financial affidavit of Defendant
31 Ball.

32 II. FACTUAL BACKGROUND

33 On January 15, 2013, a grand jury sitting in the District of Nevada returned an indictment
34 against Defendant David Ball which alleged that he participated in a massive conspiracy to take
35 over homeowners' associations ("HOAs") in the Las Vegas area and award certain HOA legal
36 and construction work to co-conspirators. (Doc. No. 1.) Defendant Ball was charged with one

1 count of conspiracy to commit wire and mail fraud and one count of mail fraud. (*Id.*) The next
 2 day, Defendant Ball signed, submitted, and attested to a financial affidavit, upon which the Court
 3 relied when it appointed CJA counsel to represent Defendant Ball. (Doc. No. 42.)

4 On January 29, 2014, investigators interviewed Defendant Ball's ex-wife, Eleanor Ball.¹
 5 Ms. Ball told investigators that the evening of Defendant Ball's initial appearance (*i.e.* January
 6 16, 2013), an officer of Pre-Trial Services called Ms. Ball to verify certain information
 7 previously provided by Defendant Ball. Ms. Ball told the Pre-Trial officer, *inter alia*, that to her
 8 knowledge Defendant Ball was employed at Eldorado Resorts Company in real estate sales.
 9 When Defendant Ball arrived home that same evening, Ms. Ball told Defendant Ball about what
 10 she told Pre-Trial Services, Defendant Ball became angry and said in substance "I will lose my
 11 free lawyer." The next morning, Defendant Ball called Pre-Trial Services and told them that Ms.
 12 Ball's statements about his employment were incorrect.

13 Ms. Ball also informed the investigators that Defendant Ball had received significant
 14 benefits from the Department of Veterans Affairs before and after his indictment, including a
 15 \$34,000 lump sum payment in October 2013. Ms. Ball did not believe Defendant Ball had
 16 reported this change in financial circumstances to the Court, and believed he may have concealed
 17 these payments from Pre-Trial Services altogether.

18 The United States has subsequently obtained records from Defendant Ball's employer,
 19 indicating that he began working at Eldorado Resorts Company in June 2012, seven months prior
 20 to his indictment and initial appearance.

21 **III. ARGUMENT**

22 **A. It Is Lawful for the Court to Order Disclosure of Financial Affidavits Under
 23 These Circumstances**

24 Submitting a materially false financial affidavit to the Court under penalty of perjury is a
 25 crime. *See United States v. McNeil*, 362 F.3d 570, 573 n.2 (9th Cir. 2004) ("Submitting a false

26¹ Defendant Ball and Ms. Ball were divorced on October 21, 2013. A copy of the Clark
 County Family Court docket related to their divorce is attached as Exhibit A.

1 CJA-23 form may subject a defendant to criminal liability under other statutes, for example,
2 under 18 U.S.C. § 1621, the general statute on perjury, or 18 U.S.C. § 1623, which punishes the
3 making of a false material declaration in any proceeding before, or ancillary to, any court.”).
4 Courts in the Ninth Circuit have made the financial affidavit available to government prosecutors
5 where there is evidence that the defendant lied on the affidavit. *Cf. United States v. Hernandez-*
6 *Ramirez*, 254 F.3d 841, 842-843 (9th Cir. 2001) (finding obstruction enhancement appropriate
7 where defendant failed to disclose certain ownership interests on financial affidavit seeking
8 appointed counsel, demonstrating prosecution obtained underlying financial affidavit). The
9 United States will be unable to prosecute this potential crime without access to the financial
10 affidavit itself.

11 In *Seattle Times v. United States*, in considering the government’s motion to unseal
12 financial records, the Ninth Circuit set forth the standard for analyzing whether financial
13 affidavits should remain under seal, holding that the accused must be faced with substantial
14 hazards of self-incrimination that are “real and appreciable” and not merely “imaginary and
15 unsubstantial.” *Seattle Times v. United States*, 845 F.2d 1513, 1518 (9th Cir.1988) (citing *United*
16 *States v. Neff*, 615 F.2d 1235, 1239 (9th Cir.1980)). This is not a case where the requested
17 disclosure of the Defendant’s financial affidavit implicates the Defendant’s Fifth Amendment
18 rights. *Contrast Seattle Times*, 845 F.2d at 1518 (granting order to unseal financial affidavits)
19 with *United States v. Hickey*, 997 F.Supp. 1206 (N.D. Cal. 1998) (refusing to unseal financial
20 affidavits). In *Hickey*, the defendants were charged with wire fraud, mail fraud, and securities
21 fraud. The court denied the government’s motion to disclose the defendants’ financial affidavits
22 because “the Defendants’ financial affidavits contain information regarding Defendants’
23 financial status, which is directly relevant to the charges against them. Thus, Defendants are
24 faced with substantial and real hazards of incrimination should the Court unseal the financial
25 affidavits.” *Id.* at 1208. Significantly, in *Hickey*, the government sought to discover and use
26 information contained in the affidavits as part of the case in chief in the then-indicted case. That
is not the case here. In contrast, here, the Government seeks the disclosure of information

1 regarding the Defendant's reported employment status to investigate possible false statements to
 2 the Court. Unlike *Hickey*, disclosure of the employment information requested by the
 3 Government is not related to the merits of the underlying case, and therefore, does not implicate
 4 the Defendant's Fifth Amendment rights.

5 **B. The Federal Marital Privileges Do Not Apply**

6 Although the United States obtained information supporting this motion from Defendant
 7 Ball's ex-wife based in part on communications between Defendant Ball and his ex-wife during
 8 their marriage, the marital privileges do not apply in this case, and should not prevent the Court
 9 from granting the instant motion. Federal courts long have recognized two distinct privileges
 10 arising from the marriage relationship: (1) the adverse spousal testimony privilege and (2) the
 11 confidential communications privilege. Neither the adverse spousal testimonial privilege nor the
 12 marital communications privilege bars use of the statements made by Ms. Ball to Government
 13 investigators for the purpose of this motion. The adverse spousal testimonial privilege exists only
 14 *during* the marriage; because the Balls are divorced, this privilege is no longer at issue.
 15 Moreover, the adverse spousal testimonial privilege is held by the witness, meaning Ms. Ball can
 16 make a unilateral decision to waive the privilege over the Defendant Ball's objection. The
 17 marital communications privilege bars *testimony* concerning private communications between
 18 spouses during the course of the marriage; it does not apply to statements made in furtherance of
 19 the Government's investigation.

20 **1. Federal Courts Apply Federal Common Law on Privileges, Not State
 21 Law**

22 In federal court, questions of privilege are governed by Rule 501 of the Federal Rules of
 23 Evidence which, in turn, is construed "in the light of the court's reason and experience," Fed. R.
 24 Evid. 501, and federal common law. *Trammel v. United States*, 445 U.S. 40, 47 (1980). State
 25 statutes and case law do not control in a federal criminal action. *United States v. Gillock*, 445
 26 U.S. 360, 368 (1980); *see also United States v. Roberson*, 859 F.2d 1376, 1378 (9th Cir. 1988);

In re Fischel, 557 F.2d 209, 211 (9th Cir. 1977) (holding federal, not state, law governs the attorney-client privilege in a federal criminal proceeding).

2. The Adverse Spousal Testimony Privilege Does Not Apply Here

The privilege against adverse spousal testimony allows a person who is subpoenaed as a witness in a criminal proceeding to refuse to testify against his or her spouse. *See Trammel* 445 U.S. 40 at 53 (1980). There are important distinctions between this privilege and the marital communications privilege. First, it inures only to the benefit of the person who is subpoenaed – the spousal privilege cannot be claimed by the non-testifying spouse. The person called to testify can make a unilateral decision to invoke or waive the privilege, and can do so over the other spouse's objection. *See id.* (concluding that “the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying”). Second, the parties must be married at the time of the testimony for the privilege to be successfully invoked – a witness cannot claim a privilege to withhold testimony against a former spouse. *See United States v. Vo*, 413 F.3d 1010, 1016 (9th Cir. 2005) (the spousal privilege “permits a witness to refuse to testify against his or her spouse *while they are married*”)(emphasis added)). Third, it is only the spouse's testimony in the courtroom that is prohibited. *Trammel*, 445 U.S. at 53 n.12 (1980) (asserting that no privilege “prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension”); *United States v. Lefkowitz*, 464 F. Supp. 227, 233 n.3 (C.D. Cal. 1979) (“[T]he marital privilege is inapplicable here since the spouse/informant has not testified, but rather has only provided information to a government agency.”)

Statements made by the Defendant's wife to the government investigators are not subject to the adverse spousal testimony privilege. First, the Defendant and his wife were no longer married on January 29, 2014, at the time she was interviewed by the Government's investigators. Second, the witness-spouse alone has a privilege to refuse to testify adversely, which means that Ms. Ball could unilaterally waive any privilege that exists. Third, the privilege does not apply to out-of-court statements made in the course of a Government investigation. Thus, the adverse

1 spousal testimony privilege does not apply to Ms. Ball's statements to the government
 2 investigators.

3 **3. The Confidential Communications Privilege Does Not Apply Here**

4 The marital communications privilege protects private communications between spouses
 5 that are made during the course of the marriage. *See United States v. Banks*, 556 F.3d 967, 972
 6 (9th Cir. 2009). There are three elements to the marital communications privilege. The substance
 7 of the communications must: (1) be intended as communication to the other spouse; (2) be made
 8 during a valid marriage; and (3) be confidential. *See United States v. Griffin*, 440 F.3d 1138,
 9 1143 (9th Cir. 2006); *United States v. Marashi*, 913 F.2d 724, 729-30 (9th Cir. 1990). Unlike the
 10 adverse spousal testimony privilege, either spouse – the witness on the stand or the non-
 11 testifying spouse – may invoke the privilege. *See United States v. Montgomery*, 384 F.3d 1050,
 12 1058-59 (9th Cir. 2004) (holding that “either spouse may assert the privilege to prevent
 13 testimony regarding communications between spouses”). The marital communications privilege
 14 survives the termination of the marriage. *See United States v. Bolzer*, 556 F.2d 948, 951 (9th Cir.
 15 1977) (citing *Pereira v. United States*, 347 U.S. 1, 6 (1954)). Like the adverse spousal testimony
 16 privilege, the confidential communications privilege applies only to *testimony*, not to statements
 17 made in the course of an investigation. This privilege bars “*testimony* concerning intra-spousal,
 18 confidential expressions arising from the marital relationship.” *Bolzer*, 556 F.2d at 951
 19 (emphasis added). The Ninth Circuit “construe[s] the marital communications privilege
 20 narrowly, to promote marriage without thwarting the administration of justice.” *Vo*, 413 F.3d at
 21 1016.

22 The marital communications privilege is construed as “a rule of evidence … prescrib[ing]
 23 only the admission into evidence, either directly or indirectly, of confidential marital
 24 communications.” *United States v. Harper*, 450 F.2d 1032, 1045-1046 (5th Cir. 1971).
 25 Accordingly, courts have consistently held that police may use confidential marital
 26 communications to investigate crimes, particularly when one spouse volunteers the information.
See, e.g., In re Grand Jury Investigation of Hugle, 754 F.2d 863, 866 (9th Cir. 1985) (denying

1 request that the government and its investigators be enjoined from interrogating the defendant's
 2 wife and holding that the confidential communications privilege "relates only to testimony in
 3 judicial or grand jury proceedings"); *Harper*, 450 at 1046 (concluding the government did not
 4 violate the privilege for confidential marital communications when it used the defendant's wife's
 5 statements as basis for its investigation of defendant's illegal activities and did not attempt to
 6 introduce the statements into evidence at trial); *United States v. Giavasis*, 805 F.2d 1037, 1986
 7 WL 18086 at *3 (6th Cir. 1986) (*per curiam*) ("Privileges, of course, only protect against the
 8 disclosure of marital confidences in *testimony*, not cooperation with law enforcement officials"
 9 (emphasis added)); *United States v. Carlson*, 946 F. Supp. 2d 1115, 1126-28 (D. Or. 2013)
 10 (holding that the marital communications privilege does not prevent government from enlisting
 11 one spouse to give information concerning the other or to aid in the other's apprehension and
 12 finding that "the very concept of 'privileged information' is intrinsically linked to court
 13 proceedings: the disclosure of the same information outside of a courtroom – for example, to a
 14 police officer – is most accurately described as a breach of confidentiality, not as a violation of
 15 privilege"); *United States v. Winfree*, 170 F.Supp. 659, 660 (E.D. Pa. 1959) (holding that
 16 information volunteered by a spouse in an extrajudicial investigation was not improperly
 17 obtained).

18 In the present case in the Government did not call Mrs. Ball as a witness and elicit from
 19 her confidential statements made to her by Defendant Ball. The only use made by the
 20 Government of Mrs. Ball's statements is in the instant motion. Even if Ms. Ball's statements to
 21 investigators included recitations of confidential communications with Defendant Ball, the
 22 marital privileges do not prevent Government investigators from using confidential information
 23 obtained from spouses in their investigations. *Carlson*, 946 F. Supp. 2d at 1126 n.9 (citing
 24 *Trammel*, 445 U.S. at 52 n.12).

25 **C. Even if State Law Were To Apply, NRS § 49.295 Does Not Apply Here**

26 Even if the Court were to apply state law to these facts, the Nevada statutory state law
 marital privileges do not apply. As to the adverse spousal testimonial privilege, the statute

1 provides that “[a] husband cannot be examined as a witness for or against his wife without his
 2 consent, nor a wife for or against her husband without her consent.” NRS § 49.295(1)(a). At the
 3 time Ms. Ball was interviewed by federal agents, she was not Defendant Ball’s wife, and thus
 4 even had she been “examined as a witness,” NRS § 49.295(1)(a) does not apply.

5 As to the confidential communications privilege, the Nevada statute provides that
 6 “[n]either a husband nor a wife can be *examined*, during the marriage or afterwards, without the
 7 consent of the other, as to any communication made by one to the other during marriage.” NRS §
 8 49.295(1)(b) (emphasis added). Following the federal courts’ approach to this issue, the Nevada
 9 Supreme Court has held that the term “examined” under NRS § 49.295 does not encompass
 10 statements given to investigators. *See Shults v. State*, 96 Nev. 742, 747 (1980) (finding that
 11 where defendant’s wife was interviewed by police detectives, “she was not actually ‘examined’
 12 as contemplated by the statute”). Therefore, even if the Court were to apply state law, the state
 13 law marital privileges do not apply.

14 IV. CONCLUSION

15 For the foregoing reasons, the United States respectfully requests that the Court order the
 16 Pre-Trial Services office to provide the United States with a copy of Defendant Ball’s financial
 17 affidavit and any records of calls between the Pre-Trial Services office and Defendant Ball
 18 and/or Ms. Ball in January 2013.²

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 25 If the Court is concerned that portions of Defendant Ball’s financial affidavit unrelated to
 26 his employment status could be prejudicial against him in weighing the *Seattle Times* test
 discussed *supra*, the Court could order the disclosure of a redacted portion of the
 affidavit, disclosing only the name/personal information of the affiant, the section on
 current employment, and the signature section.

DATED: March 3, 2014

Respectfully submitted,

JEFFREY KNOX
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Fraud Section, Criminal Division

/s/ Thomas B.W. Hall
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Criminal Division, Fraud Section

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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11 I, the undersigned, hereby certify that this pleading was filed with the clerk of court via
12 ECF and will be served electronically via ECF on all parties that have entered their appearances
13 in this case.

14
15 Dated: March 3, 2014

16
17 JEFFREY H. KNOX
18 Chief, U.S. Department of Justice,
19 Fraud Section, Criminal Division

20 */s/ Thomas B.W. Hall*
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